Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

NORMA KIRCHMANN,

Petitioner,

v.

LAKE ELSINORE UNIFIED SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court held in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690-691 & n. 54 (1978), that Congress intended municipalities and other local government units that are not considered part of the State for Eleventh Amendment purposes to be included among those "persons" to whom 42 U.S.C. § 1983 applies. And the Court held in *Mt. Healthy City School District Bd. of Ed. v. Doyle*, 429 U.S. 274, 280-281 (1977), that a local school board is more like a county or city than it is like an arm of the State and, therefore, was not entitled to Eleventh Amendment immunity from suit.

The question presented here is this:

Acknowledging that the State of California exercises "plenary power" over California public education, is a local California school district a "person" for the purposes of § 1983 or an "arm of the State" for the purposes of the Eleventh Amendment, where the State has waived the tort immunity of its school districts and explicitly permits them to be subjected to suit in state court on a tort claim whose source is a congressional enactment?

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The September 27, 2000, opinion of the California Court of Appeal, Fourth District, Division Two, as modified on October 11, 2000, affirming the sustaining of the demurrer by the Superior Court for the County of Riverside, is published as *Kirchmann v. Lake Elsinore Unified School Dist.*, 83 Cal.App.4th 1098, 100 Cal.Rptr.2d 289, 147 Ed. Law Rep. 224 (2000). *See* App. 1-29. The Supreme Court of California's order denying Kirchmann's petition for review is reprinted at App. 30.

BASIS FOR THIS COURT'S JURISDICTION

The California Supreme Court denied discretionary review on January 10, 2001. This Court possesses jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE TO THIS CASE

The Eleventh Amendment:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected,

> any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Government Code § 815:

> Except as otherwise provided by statute:
>
> (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

California Government Code § 811.8:

> "Statute" means an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act.

STATEMENT OF THE CASE

In *Kirchmann v. Lake Elsinore Unified School Dist.*, 57 Cal.App.4th 595, 599, 614 (1997) [*Kirchmann I*], an administrative mandamus proceeding, the California Court of Appeal, Fourth District, Division Two, held that the School District unlawfully suspended its employee, Norma Kirchmann, based on speech that was protected by the First Amendment. Thereafter, she brought a civil action for damages in the Superior Court of Riverside County in which she alleged, inter alia, that the School District was liable to her for violating her First Amendment rights under 42 U.S.C. § 1983. The superior court

sustained defendant's demurrer to that claim and she appealed to the same California Court of Appeal.

On appeal, Kirchmann argued that the School District was a "person" under § 1983, and that it was not entitled to Eleventh Amendment immunity. The California Court of Appeal held that a California school district is an arm of the State of California for Eleventh Amendment purposes, and "does enjoy the state's immunity from liability under section 1983." App. 2; *see* App. 25. This holding was founded principally on the court's belief that:

> public education in California "is uniquely a fundamental concern of the State" (*Butt v. State of California* (1992) 4 Cal.4th 668, 685), and "[the California] Constitution has always vested 'plenary' power over education not in the districts, but in the State. . . . " (*Id.* at p. 688.)
>
> . . . .
>
> In view of the extensive control of the state over fiscal affairs and political status of school districts, the Ninth Circuit in [*Belanger v. Madera Unified School Dist.*, 963 F.2d 248, *cert. denied*, 507 U.S. 919 (9th Cir. 1992)] correctly determined a California school district should be considered an arm of the state for purposes of the Eleventh Amendment.

App. 2, 25. Kirchmann petitioned for rehearing in the Court of Appeal, arguing that the court had overlooked a critical point repeatedly made in the briefing and at oral argument:

> No decision regarding the school district's potential section 1983 liability can completely or adequately decide that question without determining [California Government Code] section

> 811.8's interrelationship between sovereign immunity principles and section 1983 causes of action brought in California courts.

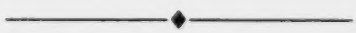
Appellant's Petition for Rehearing, at 2. In response, the Court of Appeal denied rehearing, although it modified its opinion without changing its judgment. App. 27. The Court of Appeal held:

> Kirchmann overlooks the fact that whether an entity is a "person" subject to suit under section 1983 is a matter of *federal* law and is not affected by whether the entity has sovereign immunity under state law. . . .
>
> Thus, California cannot, by enacting the Tort Claims Act, make school districts liable under section 1983 if they are not "persons" subject to section 1983 liability under federal law. As [*Will v. Michigan Department of State Police*, 491 U.S. 58 (1989)] and its progeny demonstrate, the answer to that question depends on whether an entity is an arm of the state for Eleventh Amendment purposes.

App. 28 (emphasis in original).

The California Supreme Court denied Kirchmann's petition for discretionary review on January 10, 2001. One justice believed that review should be granted. App. 30.

Kirchmann brings this petition for writ of certiorari believing that the California Court of Appeal has decided important questions of federal law in a manner that conflicts with relevant decisions from this Court. Rule 10(c).



ARGUMENT

A CALIFORNIA SCHOOL DISTRICT MAY BE HELD LIABLE UNDER 42 U.S.C. § 1983 FOR VIOLATING FEDERAL CONSTITUTIONAL RIGHTS

A.

This Court implicitly has suggested that States are at liberty to subject their lesser governmental entities to certain federal claims, free from any Eleventh Amendment impact, if they choose to make their own courts available as forums for those claims. To the best of Kirchmann's knowledge, however, the Court's § 1983/Eleventh Amendment jurisprudence has never explicitly decided whether that important proposition is true. In this case, that proposition is presented to the Court in the context of a *Monell* claim brought in a California state court against a California school district. Kirchmann argues that, even though the State of California exercises "plenary power" over California public education, a local California school district is a "person" for the purposes of § 1983, not an "arm of the State" for the purposes of the Eleventh Amendment, because the State has waived the tort immunity of its school districts and explicitly permits them to be subjected to suit in state court on a tort claim whose source is a congressional enactment.

A grant of this petition will provide the Court the opportunity to address at least two questions that it expressly left open in prior decisions. The first question is whether a school district is a "person" for the purposes of § 1983. In *Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274, 279 (1977), the Court stated that the "related question of whether a school district is a person for

purposes of § 1983 is likewise not before us. We leave [that question] for another day. . . . "

The second, weightier question is whether, under the Eleventh Amendment, a governmental entity can be considered an arm of the state for some purposes, but not for other purposes. In *Regents of the University of California v. Doe*, 519 U.S. 425, 427 n. 2 (1997), the Court stated "[n]or is it necessary to decide whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others."

A grant of this petition will also provide the Court the opportunity to further refine the most relevant, important factors that a court should consider when determining whether an entity is entitled to Eleventh Amendment immunity. In this vein, the Court's decisions have focused most heavily upon determining whether a money judgment against a state governmental entity would be enforceable against the State. *See Regents of the University of California v. Doe, supra*, 519 U.S. at 430; *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Lower federal and state courts will benefit greatly should the Court define a more specific basis or "test" to determine which entities properly fall within the scope of the immunity.

B.

The Court has held that the Eleventh Amendment largely shields States from federal-court suits brought without their consent, leaving parties with claims against a State to present them in State court, if permitted by the

State. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). That holding, however, is limited in the § 1983 context, because a State is not a person within the meaning of that section. *Will v. Michigan Department of State Police*, 491 U.S. 58, 64, 71 (1989). As *Will* demonstrates, a § 1983 action brought in state court against the State is not viable.

The Court observed in *Hess* that the United States Courts of Appeals have recognized that the "most salient factor in Eleventh Amendment determinations" is the "vulnerability of the State's purse." *Hess, supra*, 513 U.S. at 49; *see also Regents of the University of California v. Doe, supra*, 519 U.S. at 430 [question whether money judgment against state instrumentality would be enforceable against the State is of "considerable importance"]. But in California, a school district is not a state agency "claims against which are paid by warrants issued by the [Controller of the State of California]." *Johnson v. San Diego Unified School Dist.*, 217 Cal.App.3d 692, 699 (1990). And "[i]t is without dispute . . . that potential liability rests not with the state, but the school district." *Id.* at 700.

In *Doe*, the Court observed that the Court's Eleventh Amendment decisions focus "particular attention" on whether "both legally and practically" a state "would have been obligated to pay a judgment." *Doe, supra*, 519 U.S. at 430. And *Doe*'s ultimate holding was that the Amendment "protects the State from the risk of adverse judgments even though the State may be indemnified by a third party." *Doe, supra*, 519 U.S. at 431. The California Court of Appeal below acknowledged, consistent with *Johnson, supra*, that "for purposes of paying judgments, a

school district is not considered an agency whose liabilities 'are paid by warrants drawn by the Controller.' " App. 15. The Court of Appeal, however, took an unwarranted analytical approach towards the Eleventh Amendment immunity question it was deciding. In contrast to the approach taken in this Court and the federal courts of appeals, the court below severely downplayed the degree of emphasis that ought to be placed on whether a tort judgment against a school district is to be paid from the State treasury's public funds. App. 13-16.

In the instant case, Kirchmann did not sue the State of California qua state. Nor did she sue an entity that clearly would be regarded as a California state governmental department, such as the California Department of Education or the California Highway Patrol, two State entities analogous to the Michigan State Police sued in *Will*. Rather, she sued an entity with many characteristics in common with a city or a county, which have been held not to be the State for Eleventh Amendment purposes. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690-691 (1978). For example, the governing board of a California school district may, in the name of the district, sue and be sued. California Education Code § 35162; California Government Code § 945. The governing board is liable for debts and contracts. *Id.* § 35200. A California school district "constitutes a separate entity apart from the Department of Education. . . . " *Johnson, supra*, 217 Cal.App.3d at 696. And a school district is required to purchase liability insurance, California Education Code § 35208; and is liable for payment of judgments, *Johnson, supra*, 217 Cal.App.3d at 699.

In Kirchmann's judgment, the Court of Appeal's decision places undue weight on the state's "plenary power" over public education, departing from the established approach in federal cases. As noted above, the Court of Appeal grounded its decision on the fact that public education in the State of California is a fundamental concern of the State, and that the California Constitution vests "plenary power" over education in the State, not in school districts. App. 1-2. In arriving at its conclusion conferring Eleventh Amendment immunity upon the School District, the court pointed to "the *extensive control of the state* over fiscal affairs and political status of school districts." App. 25 (emphasis added). This Court, however, has specifically rejected a State's "control" over a governmental entity as a useful means to determine an entity's entitlement to Eleventh Amendment immunity. In *Hess, supra*, the dissent argued in favor of a "control test" in which the court inquires into the degree of control, if any, the State possesses over an entity performing governmental functions. Using this test, the governmental entity may properly be called an extension of the State if the latter exercises sufficient control over the functions of the former. The dissent observed that "[s]uch control can exist even where the State assumes no liability for the entity's debts." *Hess, supra*, 513 U.S. at 61-62 (O'Connor, J., dissenting). The Court, however, observed that "[g]auging actual control . . . can be a 'perilous inquiry' and 'an uncertain and unreliable exercise.' " *Hess, supra*, 513 U.S. at 47. The Court firmly rejected such a "control test," holding that "rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be

paid out of a State's treasury." *Id.* at 48. The California Court of Appeal, however, distinguished *Hess* on the grounds that it was an "unusual" case in that "it involved an entity created by two states with the consent of Congress." App. 15.

The Court of Appeal declined to follow the recognized federal-court approach to resolving Eleventh Amendment issues, in which a court will examine state law to determine the relationship between the entity and the State, *e.g., Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977), but will normally accord "dispositive weight" to the impact, if any, of a judgment upon the state treasury. *Hess, supra*, 513 U.S. at 49. Moreover, the Court of Appeal declined to follow the holding in *Mt. Healthy* and stated that "[u]nlike the Ohio school board involved in *Mt. Healthy*, California school districts are subject to substantially more than 'some' state funding and control." App. 25. And the court below also rejected this Court's statement in *Missouri v. Jenkins* 495 U.S. 33, 56, fn. 20 (1990), that "the Eleventh Amendment . . . does not afford local school boards . . . immunity from suit. . . . " The California Court of Appeal did not believe itself bound by that statement, because *Missouri v. Jenkins* merely "[cited] *Mt. Healthy* . . . without further analysis." App. 11.

C.

This Court implicitly has suggested that States are at liberty to subject their lesser governmental entities to federal claims free from any Eleventh Amendment impact, if they choose to make their own courts available

as forums for those claims. To elaborate, the Court has stated that "a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) [emphasis in original]. States retain their immunity and concomitant authority to decide whether to allow private suits against the sovereign in their own courts. *Alden v. Maine*, 527 U.S. 706, 743 (1999). A State may waive sovereign immunity in its own courts, although such waiver does not waive Eleventh Amendment immunity in federal courts. *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 473-474 (1987). A party with claims against a State may present them in State court, if permitted by the State. *Hess, supra*, 513 U.S. at 39. Indeed, the Court has not "questioned the general proposition that a State may waive its sovereign immunity and consent to suit." *Alden v. Maine, supra*, 527 U.S. at 737. One important limitation upon sovereign immunity is that "it bars suits against States but not lesser entities." *Id.* at 756. The Court has observed on occasion that whether an entity is a "person" under § 1983, and whether the same entity is protected by the Eleventh Amendment are separate legal issues. *Will, supra*, 491 U.S. at 66; *cf. Mt. Healthy City School District Bd. of Ed. v. Doyle, supra*, 429 U.S. at 279 [school district was not entitled to Eleventh Amendment immunity, but question of whether a school district is a person for purposes of § 1983 was not before Court]. Finally, ultimate control and definition of the characteristics of State public entities is vested in the State, which may create and shape any lesser State entity as it wishes. *See Hess, supra*, 513 U.S. at 47.

Implicit in the foregoing legal principles is a principle that Kirchmann believes to be incontrovertible: When a State waives the tort immunity of one of its lesser entities and explicitly permits it to be subjected to a tort claim whose source is a congressional enactment, that lesser entity is not the "arm of the State" for the purposes of the Eleventh Amendment, and is a "person" for the purposes of § 1983. *Cf. Alden v. Maine, supra,* 527 U.S. at 757-758 [Article I does not permit Congress to subject State of Maine to private suits for damages in state courts, because State of Maine has not consented to suits for monetary relief under FLSA]. Kirchmann explains hereafter how this implicit legal principle ought to authorize her *Monell* claim against the Lake Elsinore School District.

D.

The doctrine of sovereign immunity in California is relatively straightforward. After the California Supreme Court abolished common law sovereign immunity in California in *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211 (1961), the California Legislature enacted the California Tort Claims Act, California Government Code § 810 et seq., reestablishing sovereign immunity. The Act, however, recognizes a limited waiver of sovereign immunity as to California public entities, permitting statutorily recognized tort causes of action to be brought in California courts against California governmental entity tort-feasors. *See Thompson v. City of Lake Elsinore*, 18 Cal.App.4th 49, 61-62 (1993). Thus, pursuant to the Act, "[e]xcept as otherwise provided by *statute*: (a) A public entity is not liable for an injury. . . . " California Government Code

§ 815 [emphasis added]. Under Government Code section 811.8, the Legislature defined the range of enactments that are to be considered a "statute." As is clear from § 811.8, laws enacted by the United States Congress must be deemed "statutes" under the Act: " 'Statute' means an act adopted by the Legislature of this State *or by the Congress of the United States*, or a statewide initiative act." California Government Code § 811.8 [emphasis added]. Thus, it is beyond dispute that 42 U.S.C. § 1983 is a "statute" within the meaning of the California Tort Claims Act. Moreover, the numbers of tort cases brought against California school districts under the Act are legion, and none establishes a California school district's blanket immunity from tort liability. *See e.g., Brown v. Poway Unified School Dist.*, 4 Cal.4th 820 (1993); *Christopher P. v. Mojave Unified School Dist.*, 19 Cal.App.4th 165 (1993); *Constantinescu v. Conejo Valley Unified School Dist.*, 16 Cal.App.4th 1466 (1993).

Kirchmann argued below that under relevant California law, a school district is not an "arm of the state" for tort purposes. *Cf. Will, supra*, 491 U.S. at 70 [holding therein "applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes."]. Kirchmann repeatedly brought to the California Court of Appeal's attention that the State of California had waived the sovereign immunity of California school districts for state as well as federal tort claims created by statute. Kirchmann's Opening Brief in Court of Appeal at 11; Kirchmann's Reply Brief at 6; Kirchmann's Oral Argument in Court of Appeal on September 6, 2000; Kirchmann's Petition for Rehearing at 1-8. She also brought to the Court of Appeal's attention this

Court's characterization in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305-306 (1986), of a § 1983 action as a "species of tort liability" in favor of persons who are deprived of constitutional rights. Kirchmann's Opening Brief in Court of Appeal at 6; Kirchmann's Petition for Rehearing at 4.

The Court of Appeal below rejected Kirchmann's argument that, by virtue of Government Code § 811.8, California school districts could be held liable for *Monell* claims brought in state court under § 1983, holding that:

> whether an entity is a "person", subject to suit under section 1983 is a matter of *federal* law and is not affected by whether the entity has sovereign immunity under state law. . . .
>
> Thus, California cannot, by enacting the Tort Claims Act, make school districts liable under section 1983 if they are not "persons" subject to section 1983 liability under federal law.

App. 28. This reasoning is untenable, at best. The Court of Appeal grounded this holding on the language in *Howlett v. Rose*, 496 U.S. 356 (1990), that because the "Court has construed the word 'person' in § 1983 to exclude States, neither a federal court nor a state court may entertain a § 1983 action against such a defendant." *Id.* at 375-376; *see* App. 28. The Court of Appeal's belief that a public entity's lack of sovereign immunity under state law has no bearing on the question of the School District's *Monell* liability attaches some talismanic effect to the concept of Eleventh Amendment immunity. But this Court has repeatedly indicated that Eleventh Amendment immunity, although cloaked in constitutional language, is but a manifestation of the traditional concept of

sovereign immunity. The Amendment's whole point is simply that it "enacts a sovereign immunity from suit. . . . " *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

The court below cited no authority holding that California school districts are the State or an arm thereof for tort purposes, and plainly disregarded two California decisions to the contrary – *Butt v. State of California*, 4 Cal.4th 668 (1992); and *Johnson v. San Diego Unified School Dist.*, 217 Cal.App.3d 692, *supra*. In *Butt*, the California Supreme Court held that "[school] districts are separate political entities for some purposes." *Butt, supra*, 4 Cal.4th at 688. As support for that proposition the Supreme Court cited *Johnson* approvingly, and noted that respondeat superior does not make the State liable for torts of a local school district or its employees. *Id.* A "[School] District constitutes a separate entity apart from the [State] Department of Education. . . . " *Johnson, supra*, 217 Cal.App.3d at 696. The "separate distinct character of the school district as distinguished from the state educational entities is made clear by . . . [statute]." *Id.* at 699.

The Court of Appeal's reasoning above in rejecting Kirchmann's sovereign immunity waiver argument actually is premised on its ultimate holding that the School District is immune from suit because it is an instrumentality of the State. *Compare* App. 28 *with* App. 25. Thus, its logic is circular. The court rejected Kirchmann's waiver argument by using the ultimate holding that it had not yet reached. Given, however, the provisions of the Act and the California Supreme Court's view expressed in *Butt, supra*, that California "[school] districts are separate political entities" for tort purposes, neither

the California Legislature nor Supreme Court views school districts as anything except "persons" for the purposes of tort liability. Kirchmann submits that despite the Court of Appeal's view, the California Tort Claims Act's waiver of sovereign immunity for federal tort claims, § 811.8, is central to, if not dispositive of, the question whether California school districts may be held liable in State court for *Monell* claims.

E.

As noted previously, the Court in *Doe* left open the question "whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others." *Doe, supra,* 519 U.S. at 427 n. 2. In Kirchmann's view, this case presents a classic situation in which this Court can answer that question with a resounding "yes."

Kirchmann does not challenge the Court of Appeal's observation that the State of California exercises "plenary power" over public education in the State. *See* App. 2, 22. The California Supreme Court pointed to such power in *Butt, supra,* 4 Cal.4th at 688, to justify in part its conclusion therein that the State was required by law to keep open the public schools in the financially insolvent Richmond Unified School District. *Id.* at 674, 704. In *Butt,* the school district announced that it lacked the funds to complete the 1990-1991 school term, and that it would close its doors six weeks before the end of the term. In response, parents of district school children sought injunctive relief in a California superior court to require the State to ensure that the district's students would

receive a full school term or its equivalent. The trial court granted injunctive relief, and the California Supreme Court upheld all of the injunction's provisions, except for those regarding funding. The *Butt* decision was founded almost entirely on California law, and nothing therein so much as suggested that a California school district was the State under the Eleventh Amendment.

In *Butt*, the California Supreme Court also observed that California has a "local district system of school administration" that is recognized by the California Constitution, which is "deeply rooted in tradition," but that the California Legislature possessed the power to "create, dissolve, combine, modify, and regulate local districts at pleasure." *Id.* This latter point is precisely the rationale that this Court articulated in *Hess* for rejecting the "control test" urged by the dissent therein: "But ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates." *Hess, supra*, 513 U.S. at 47.

It is probable that there exist circumstances in which a private party could sue a California school district in a California superior court under federal law because of the district's implementation or failure to implement certain statutorily mandated educational programs. In the event that such a lawsuit impacted the State treasury, the school district undoubtedly would be able to assert successfully the immunity conferred by the Eleventh Amendment. Indeed, this Court has applied the Eleventh Amendment to bar relief against local governmental officials "in order to protect the state treasury from liability

that would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

There is a huge difference, however, between that situation and the one presented in the instant case. *Hess* teaches that concern for a State's solvency and dignity are the twin concerns underpinning the Eleventh Amendment. *Hess, supra*, 513 U.S. at 47. Here, the State has explicitly made local school districts liable in tort where, inter alia, Congress has enacted statutory tort remedies. Thus, it is impossible to conclude that, to permit Kirchmann's *Monell* claim to proceed in the state courts against the School District, will somehow affront California's sovereignty. The State certainly was not concerned with any potential impact upon its treasury when it created local school districts, waived their sovereign immunity, stated that they could be sued for their torts and made them liable for judgments against them. By doing so, the State has preserved its sovereign dignity while at the same time it has mitigated the "rigors of sovereign immunity" with a "sense of justice." *Alden v. Maine, supra*, 527 U.S. at 755.

F.

Kirchmann respectfully submits that "a clear and workable test in this very confused area of the law," *Duke v. Grady Mun. Schools*, 127 F.3d 972, 981 (10th Cir.1997), is needed to guide both the state and lower federal courts. A comparison of the instant case to *Duke v. Grady Mun. Schools, supra*, shows why this is so. In *Duke*, the Tenth

Circuit addressed virtually the identical question raised in the instant case. There, the court had to decide whether a New Mexico school district and its governing board were an arm of the state entitled to Eleventh Amendment immunity. The Tenth Circuit looked to many of the same factors as did the Court of Appeal herein, to resolve that question. In so doing, the Tenth Circuit described a state school system that was remarkably similar to the California public education system discussed in the court below. For example, under New Mexico law, the school district receives nearly all of its funding from the State, and the State exercises "pervasive" control over local school systems. But like California, local school districts exercise substantial local autonomy by means of locally elected school boards through which they discharge their State-mandated educational responsibilities. Moreover, like California, New Mexico school districts may sue and be sued, approve or disapprove of all employment decisions, and issue bonds under limited circumstances. Thus, the defendant school district in *Duke* possessed few, if any, significant differences from the District in the instant case.

The Tenth Circuit repeatedly referred to the difficulty that courts face when deciding whether a lesser State entity should be deemed an arm of the State for the purposes of the Eleventh Amendment, particularly after this Court's decision in *Hess, supra. Id.* at 974 n. 4, 978 & n. 13. Despite the fact that the *Duke* court and the court below were describing public school systems that, for all intents and purposes, are indistinguishable, the Tenth Circuit concluded that the New Mexico school district was not entitled to Eleventh Amendment immunity,

whereas the court below reached the opposite conclusion. *Compare id.* at 977, 981 *with* App. 25. Given the similarities in the two school systems, one would think that the results in the cases would be similar. The differences in result, however, may be explained by the differing approaches taken by the courts in deciding the question, despite their discussions of *Hess* and *Doe*. In *Duke*, the federal court held as follows:

> We interpret *Doe* to require us to focus on legal liability for a judgment, rather than practical, or indirect, impact a judgment would have on a state's treasury. As the Court specifically stated, "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." [Citation omitted.] And while such a focus in some ways ignores economic reality, it also provides a clear and workable test in this very confused area of the law. It directs courts away from having to make case-by-case fact-specific determinations of the practical impact on state treasuries. In this case, involving 98% state revenues, it may be relatively easy to determine the practical effect on the state treasury, but determining when the impact is sufficient as the percentage of state revenues declines becomes increasingly difficult.

Id. at 981. The court below, however, took the opposite tack, and explicitly rejected the Tenth Circuit's approach in *Duke*. App. 14-15.

The California appeals court adopted a "commingling" approach to school funding, relying upon "the state's extensive responsibility for and involvement in the

fiscal affairs of school districts." App. 21. Kirchmann submits that, in this post-*Hess*, post-*Doe* timeframe, the *Duke* court was correct to state, "the proper analysis focuses on whether the damage award would be paid directly by the state treasury, rather than indirectly through commingled state and local funds or state indemnification provisions." *Id.* at 977.

The difficulties that inferior appellate courts are experiencing, even on virtually identical facts, militate in favor of additional clarification by the Court. Kirchmann respectfully submits that the Court should grant this petition in order to explore the desirability of formulating a test that avoids fact-bound determinations, in favor of one that is more concrete and workable.

G.

The State of California has consented to state-court suits against California school districts for their torts. And the California Tort Claims Act expressly makes congressional enactments, such as § 1983, a potential source of tort liability against its lesser public entities. Finally, California law makes a school district liable for payment of its tort judgments, not the State. For those reasons, the Lake Elsinore Unified School District is not an arm of the State for tort purposes and cannot assert the constitutional defense of sovereign immunity to Kirchmann's *Monell* claim, a defense to which the State of California would be entitled. *See Alden v. Maine, supra,* 527 U.S. at 740; *see also Howlett v. Rose, supra,* 496 U.S. 356 [same].

Accordingly, Kirchmann respectfully requests that the Court grant this petition for writ of certiorari to

address the important question it has never before decided, to wit: is a State at liberty to subject its lesser governmental entities to certain federal claims, free from any Eleventh Amendment impact, if the State chooses to make its own courts available as forums for those claims? Within that proposition, Kirchmann asks the Court to decide whether a local California school district a "person" for the purposes of § 1983 and not the "arm of the State" for the purposes of the Eleventh Amendment, because the State has waived the tort immunity of its school districts and explicitly permits them to be subjected to suit in state court on tort claims derived from congressional enactments.

Kirchmann earnestly believes that by granting this petition, the Court can author a decision that clarifies or fills certain lacunae in its § 1983 and Eleventh Amendment jurisprudence, including the dichotomous legal issues of "person" under § 1983 versus "State" under the Eleventh Amendment. Finally, this case presents an opportunity for the Court to address the question whether some state public entities may qualify as "arms of the State" for some purposes but not others.

CONCLUSION

For the reasons set forth above, the Court should grant this petition for writ of certiorari.

DATED: April 3, 2001

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

NORMA KIRCHMAN, Plaintiff and Appellant, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	E026060 (Super.Ct.No. 314830) **OPINION** (Filed Sep. 27, 2000)

APPEAL from the Superior Court of Riverside County. Victor Miceli, Judge. Affirmed.

Donal M. Hill for Plaintiff and Appellant.

Walsh & Declues, Jeffrey P. Thompson and Gregory A. Wille for Defendant and Respondent Lake Elsinore Unified School District.

No appearance for Defendants and Respondents Keith McCarthy, Normand Tanguay, David Long, Jeanie Corral, Richard Jenkins, Vick Knight, Jeannine Martineau, and Sonja Wilson.

The issue in this case is whether the Lake Elsinore Unified School District (District) is immune from suit under Title 42 United States Code section 1983 (hereafter, section 1983) as an instrumentality of the State of California. As we will discuss, public education in California is "uniquely a fundamental concern of the State" (*Butt v. State of California* (1992) 4 Cal.4th 668, 685), and "[t]he

Constitution has always vested 'plenary' power over education not in the districts, but in the State. . . . " (*Id.*, at p. 688.) Therefore, in accordance with authority of the Ninth Circuit Court of Appeals holding that a California school district is an arm of the state for Eleventh Amendment purposes (*Belanger v. Madera Unified School Dist.* (9th Cir.1992) 963 F.2d 248, 254), we will conclude the District does enjoy the state's immunity from liability under section 1983.

I

FACTUAL AND PROCEDURAL BACKGROUND

The facts are set forth in detail in this court's previous decision in this case, *Kirchmann v. Lake Elsinore Unified School Dist.* (1997) 57 Cal.App.4th 595. Norma Kirchmann, an employee of the District, was suspended for 30 days after she anonymously communicated to bidders on a District construction management contract her view that a conflict of interest existed in the selection process. Kirchmann petitioned for a writ of mandate to overturn the suspension. This court concluded Kirchmann's communication was protected by the First Amendment, and the suspension therefore was improper. (*Id.*, at p. 614.)

Kirchmann then sued the District under section 1983. The District demurred, arguing it was an arm of the state and therefore immune from suit under section 1983. The court sustained the demurrer, and Kirchmann appealed.

II

DISCUSSION

A. *The* Belanger *Decision*

Section 1983 provides, in relevant part, that "[e]very person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . " Local governmental bodies such as cities and counties are considered "persons" subject to suit under section 1983. (*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 690-691 [98 S.Ct. 2018, 2035-2036, 56 L.Ed.2d 611].) States and their instrumentalities, on the other hand, are not. (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, [109 S.Ct. 2304, 2311, 105 L.Ed.2d 45].)

To our knowledge, no previous decision has considered the precise question here, whether a California school district should be considered a local governmental body subject to suit under section 1983, or an instrumentality of the state exempt from suit.[1] In *Belanger v. Madera Unified School Dist., supra,* 963 F.2d 248 (hereafter, *Belanger*), however, the Ninth Circuit Court of Appeals

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[1] At least two reported California decisions have involved section 1983 claims against a school district or board, but neither court discussed whether a school district has immunity as a state instrumentality. (*Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598; *McDaniel v. Board of Education* (1996) 44 Cal.App.4th 1618.)

considered a closely related question – whether a California school district was an arm of the state for purposes of the Eleventh Amendment.

The Eleventh Amendment prohibits federal courts from hearing "any suit in law or equity, commenced or prosecuted against one of the United States. . . . " The prohibition "encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." (*Regents of the University of California v. Doe* (1997) 519 U.S. 425, 429 [117 S.Ct. 900, 903, 137 L.Ed.2d 55].) The *Belanger* court concluded the school district was an arm of the state,[2] and therefore enjoyed Eleventh Amendment immunity. The court noted that, unlike school districts in most states, California districts were funded primarily by

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[2] We use the term "arm of the state" because that is the term typically employed in federal decisions considering whether a state entity is entitled to Eleventh Amendment immunity. (See, e.g., *Regents of the University of California v. Doe, supra,* 519 U.S. 425, 429-430 [117 S.Ct. 900, 904]; *Mt. Healthy City School Dist. Board of Education v. Doyle* (1977) 429 U.S. 274, 280 [97 S.Ct. 568, 572, 50 L.Ed.2d 471].) The *Belanger* court used the terms "state agency" and "agent of the state." (*Belanger, supra,* 963 F.2d at pp. 250-254.) It has been suggested that the terms "state agency" and "arm of the state" may not be synonymous. (*Lynch v. San Francisco Housing Authority* (1997) 55 Cal.App.4th 527, 535.) Because *Belanger* employed the same Eleventh Amendment analysis as the decisions which use the term "arm of the state," we do not consider the difference in nomenclature to be significant. We agree with the court in *Lynch v. San Francisco Housing Authority,* that "[i]t is the relationship between the entity and the state, not the label attached to the entity," that determines whether the Eleventh Amendment applies. (55 Cal.App.4th at p. 536.)

the state. This was attributable to two factors – first, the need to ensure equality of funding as required by *Serrano v. Priest* (1976) 18 Cal.3d 728, and second, the limitations on local property tax revenues imposed by Proposition 13. Therefore, a judgment against the school district would be paid using state funds. (*Belanger, supra,* 963 F.2d at pp. 251-252.)

In addition, the *Belanger* court noted, public education was a matter of statewide concern in California. The state exercised substantial control over school affairs and maintained beneficial ownership of school district property. The California Supreme Court had described school districts as " 'agencies of the state for the local operation of the state school system.' " (*Belanger, supra,* 963 F.2d at p. 254, quoting *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179.)

Other Ninth Circuit decisions, and decisions of federal district courts in the Ninth Circuit, similarly have extended Eleventh Amendment immunity to a California county office of education (*Eaglesmith v. Ward* (9th Cir.1995) 73 F.3d 857, 860); to California community college districts (*Mitchell v. Los Angeles Community College Dist.* (9th Cir.1988) 861 F.2d 198, 201; *Cerrato v. San Francisco Community College Dist.* (9th Cir.1994) 26 F.3d 968, 972; *Wasson v. Sonoma County Jr. College Dist.* (N.D.Cal.1997) 4 F.Supp.2d 893, 901-902; *Stones v. Los Angeles Community College Dist.* (C.D.Cal.1983) 572 F.Supp. 1072, 1076-1078), and, under *Belanger,* to a city school district. (*Doe v. Petaluma City School Dist.* (N.D.Cal.1993) 830 F.Supp. 1560, 1577.) At least one California court also has relied on *Belanger* for the proposition

that a school district enjoys Eleventh Amendment immunity. (*Cutler-Orosi Unified School Dist. v. Tulare County School etc. Authority* (1994) 31 Cal.App.4th 617, 633.)

The District contends that, since under *Belanger* a school district is an arm of the state for Eleventh Amendment purposes, it is an instrumentality of the state for purposes of section 1983 and hence immune from suit under that statute. Kirchmann challenges this conclusion on two grounds. First, she argues the fact an entity may be entitled to Eleventh Amendment immunity does not necessarily mean it is immune from suit under section 1983. Second, she argues that, even if the Eleventh Amendment immunity analysis is applicable in determining immunity from suit under section 1983, *Belanger* was incorrect in concluding a California school district enjoys Eleventh Amendment protection.

B. *Applicability of Eleventh Amendment Analysis*

Kirchmann's first argument is relatively easy to answer. She contends that, because the Eleventh Amendment only prohibits suit against a state in *federal court*, Eleventh Amendment analysis does not control whether an entity can be sued in state court, even on a federal cause of action such as a section 1983 claim.

The fact that a claim against a state or its agency cannot be brought in federal court due to the Eleventh Amendment does not, of course, necessarily mean the claim cannot be asserted in state court either. Tort actions may be brought against the state or its agencies in state court under the California Tort Claims Act (Gov.Code, § 810 et seq.) but may not be brought in federal court, because the consent to suit contained in the act

(Gov.Code, § 945) is not a waiver of Eleventh Amendment immunity. (*BV Engineering v. Univ. of Cal., Los Angeles* (9th Cir.1988) 858 F.2d 1394, 1396; *Riggle v. State of Cal.* (9th Cir.1978) 577 F.2d 579, 585-586.)

However, the analysis of the United States Supreme Court in *Will v. Michigan Dept. of State Police, supra,* 491 U.S. 58 (hereafter, *Will*), and subsequent decisions construing *Will,* make clear that, if an entity enjoys Eleventh Amendment immunity, it is also immune from suit under section 1983, even in state court. The court in *Will* did state that the scope of the Eleventh Amendment and the scope of section 1983 were "[c]ertainly" separate issues. (*Will, supra,* at p. 66.) But in holding states immune from section 1983 suits, the court noted that section 1983 was enacted in response to the inability or unwillingness of state authorities to protect civil rights. Therefore, although Congress did not establish federal courts as the exclusive forum for section 1983 suits, it plainly intended federal courts to have " 'a paramount role' " in enforcing the statute. (*Will, supra,* at p. 66.)

In light of that fact, the *Will* court concluded the fact that Congress did not override states' Eleventh Amendment immunity against suit in federal court under section 1983 indicated it also did not intend states to be subject to suit in *state court* under section 1983: "Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum of civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to

allow civil rights claimants to avoid through § 1983." (*Will, supra,* 491 U.S. at p. 66.)

From this reasoning it follows that, if an entity is not subject to suit under section 1983 in federal court because of the Eleventh Amendment, Congress presumably did not intend that it be subject to suit under section 1983 in state court either. Accordingly, numerous courts have concluded that, under *Will,* "states and 'governmental entities that are considered "arms of the State" for Eleventh Amendment purposes' are not 'persons' subject to liability under section 1983 *in any forum.*" (*Lynch v. San Francisco Housing Authority, supra,* 55 Cal.App.4th 527, 532, italics added; see also *Thompson v. City of Los Angeles* (9th Cir.1989) 885 F.2d 1439, 1443 [because University of California "is an arm of the state under the Eleventh Amendment, it follows from *Will* that UC is not a 'person' within the meaning of § 1983"]; *Simon v. State Compensation Ins. Authority* (Colo. 1997) 946 P.2d 1298, 1302 ["[U]nder *Will,* an Eleventh Amendment arm-of-the-state analysis must be applied to determine whether a state-created entity is a 'person' under § 1983."] and decisions cited at p. 1302, fn. 5; *Brooks v. Center for Healthcare Services* (Tex.App.1998) 981 S.W.2d 279, 284 [Under *Will,* "states and entities that may be characterized as arms of the state for purposes of the Eleventh Amendment may not be held liable under § 1983."]; *Board of Trustees Hamilton v. Landry* (Ind.App.1994) 638 N.E.2d 1261, 1263 [Indiana school corporation was not arm of state entitled to Eleventh Amendment immunity, and therefore was a " 'person' amenable to suit under Section 1983"].) The United States Supreme Court similarly has stated, albeit in dictum, that under *Will* "an entity with Eleventh

Amendment immunity is not a 'person' within the meaning of § 1983." (*Howlett By and Through Howlett v. Rose* (1990) 496 U.S. 356, 365, 381, fn. 24 [110 S.Ct. 2430, 2437, 2445, fn. 24] [declining to decide whether Florida school district is a "person" under section 1983].)

We therefore apply an Eleventh Amendment analysis in deciding whether the District is subject to suit under section 1983.

C. *Whether the District is an Arm of the State*

Kirchmann's second contention – that *Belanger* was incorrect in holding a California school district to be an arm of the state for Eleventh Amendment purposes – requires more extensive discussion.

1. *Applicable law*

"[T]he question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law." (*Regents of the University of California v. Doe, supra,* 519 U.S. 425, 429, fn. 5 (hereafter, *Doe*).) Even on matters of federal law, of course, this court is not bound by lower federal court authority. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782-783.) *Belanger* therefore does not necessarily control the present case. Instead, we must make an independent determination of federal law. (*Forsyth v. Jones, supra,* at pp. 782-783.)

Moreover, whether a state agency enjoys Eleventh Amendment immunity "can be answered only after considering the provisions of state law that define the

agency's character." (*Doe, supra,* 519 U.S. 425, 429, fn. 5.) Therefore, we also must consider state law in our analysis.

2. *Relevant criteria*

"A uniform test for defining the class of entities that share in the state's Eleventh Amendment immunity has not yet developed." (*Lynch v. San Francisco Housing Authority, supra,* 55 Cal.App.4th 527, 533.) In general, however, the court must examine "the relationship between the State and the entity in question." (*Doe, supra,* 519 U.S. 425, 429.)

Mt. Healthy City School Dist. Board of Education v. Doyle, supra, 429 U.S. 274 (hereafter, *Mt. Healthy*) is particularly relevant here because it involved a local school board. In *Mt. Healthy,* the court held an Ohio city school board did not enjoy Eleventh Amendment immunity, because the board was "more like a county or city than . . . like an arm of the State." (*Id.,* at p. 280.) It noted that under state law school districts were "political subdivisions," and the "State" did not include "political subdivisions." Furthermore, although the school board was subject to "some" guidance from the State Board of Education and received "a significant amount of money" from the state, it also had extensive powers to issue bonds and to levy taxes within certain restrictions. (*Id.,* at p. 280.)

Recently, the court in *Lynch v. San Francisco Housing Authority, supra,* 55 Cal.App.4th 527 set forth the criteria that federal decisions have found to be relevant in determining whether a state entity should have Eleventh Amendment immunity: whether a money judgment

against the entity would be satisfied out of state funds; the degree of funding the entity receives from the state; whether the entity has independent authority to raise funds; the extent of state control over the entity's fiscal affairs; whether the entity performs central governmental functions; whether the entity may sue, be sued, and hold property in its own name; the corporate status of the entity under state law; the degree of autonomy enjoyed by the entity; the entity's immunity from state taxation; and the geographic scope of the entity's operation. (*Id.*, at pp. 533-534.)

We believe the criteria identified in *Lynch* usefully can be grouped into two broad categories. The first category, comprising the first four criteria, concerns the degree of state involvement in the entity's fiscal affairs. The second category, comprising the remaining six criteria, concerns the political status which state law affords the entity. We will organize our analysis around these two categories.

3. *Analysis*

We begin by noting that most courts after *Mt. Healthy* have declined to extend Eleventh Amendment immunity to local school districts and boards. In 1990, the United States Supreme Court, citing *Mt. Healthy* but without further analysis, said: "[T]he Eleventh Amendment . . . does not afford local school boards . . . immunity from suit. . . ." (*Missouri v. Jenkins* (1990) 495 U.S. 33, 56, fn. 20 [110 S.Ct. 1651, 1665, fn. 20, 109 L.Ed.2d

31].) Lower federal courts, and state courts, have reached the same conclusion.[3]

These decisions, of course, are of limited assistance here, since they all involved school authorities in states other than California. Nonetheless, we will consider the discussion in these decisions to the extent it is relevant in

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[3] (See, e.g., *Narin v. Lower Merion School Dist.* (3d Cir.2000) 206 F.3d 323, 331, fn. 6 [Pennsylvania school district]; *Duke v. Grady Mun. Schools* (10th Cir.1997) 127 F.3d 972, 981-982 [New Mexico school district and board]; *San Antonio Independent School Dist. v. McKinney* (Tex. 1996) 936 S.W.2d 279, 284 [Texas school district]; *Doe v. Knox County Bd. of Educ.* (E.D.Ky.1996) 918 F.Supp. 181, 183 [Kentucky county board of education]; *Green v. Clarendon County School Dist. Three* (D.S.C. 1996) 923 F.Supp. 829, 850 [South Carolina school district]; *Daddow v. Carlsbad Mun. School Dist.* (N.Mex. 1995) 120 N.M. 97, 105-106, [898 P.2d 1235, 1243-1244] [New Mexico school board]; *Board of Trustees Hamilton v. Landry, supra,* 638 N.E.2d at p. 1266 [Indiana school corporation]; *Ambus v. Granite Bd. of Educ.* (10th Cir.1993) 995 F.2d 992, 997 [Utah school district]; *Stewart v. Baldwin County Bd. of Educ.* (11th Cir.1990) 908 F.2d 1499, 1511 [Alabama county board of education]; *Rosa R. v. Connelly* (2d Cir.1989) 889 F.2d 435, 437-438 [Connecticut school board]; *Fay v. South Colonie Cent. School Dist.* (2d Cir.1986) 802 F.2d 21, 27-28 [New York school district]; *Gary A. v. New Trier High School Dist.* (7th Cir.1986) 796 F.2d 940, 945 [Illinois school district and board]; *Minton v. St. Bernard Parish School Bd.* (5th Cir.1986) 803 F.2d 129, 131-132 [Louisiana school board]; *Stoddard v. School Dist. No. 1, Lincoln County, Wyo.* (10th Cir.1979) 590 F.2d 829, 835 [Wyoming school district]; *Unified School Dist. No. 480 v. Epperson* (10th Cir.1978) 583 F.2d 1118, 1123 [Kansas school district]; *Campbell v. Gadsden County Dist. School Bd.* (5th Cir.1976) 534 F.2d 650, 655-656 [Florida school board]; *Adams v. Rankin County Bd. of Educ.* (5th Cir.1975) 524 F.2d 928, 929 [Mississippi county school system]; but cf. *Hadley v. North Arkansas Community Technical College* (8th Cir.1996) 76 F.3d 1437, 1442 [community college was an arm of the state].)

determining whether *Belanger* correctly reached the opposite conclusion with respect to California school districts.

a. *Fiscal affairs*

Of the criteria included in our first broad category – the degree to which the state is involved in an entity's fiscal affairs – the one most often emphasized is the impact that a judgment against the entity would have on the state treasury. The Supreme Court in *Hess v. Port Authority Trans-Hudson Corp.* (1994) 513 U.S. 30 [115 S.Ct. 394, 130 L.Ed.2d 245] (hereafter, *Hess*) noted, " . . . Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." (*Id.*, at p. 48.) The court later noted that the "prevailing view" was that " 'whether any judgment must be satisfied out of the state treasury' " was " 'the most important consideration' in resolving an Eleventh Amendment immunity issue." (*Id.*, at p. 51.) The court based its emphasis on the state treasury factor on the fact that the "impetus for the Eleventh Amendment" was "the prevention of federal-court judgments that must be paid out of a State's treasury." (*Id.*, at p. 48.) The court stopped short of saying the state treasury factor was conclusive, but noted that the briefs filed by the states involved in the case before it stated the vast majority of federal circuits had generally accorded the factor " 'dispositive weight.' " (*Id.*, at p. 49.)

In *Regents of the University of California v. Doe*, the Supreme Court held that the University of California enjoyed Eleventh Amendment immunity against a breach of contract action even though the federal government

had agreed to pay any judgment arising from the action. (*Doe, supra,* 519 U.S. at pp. 430-431.) The court said that, in determining immunity, the relevant factor is "a State's *legal liability for judgments* against a state agency," not the "formalistic question of ultimate financial liability." (*Id.*, at pp. 430-431, italics added.)

Hess and *Doe* could be read to mean that, if a state would not be legally obligated to pay from its treasury a judgment against an entity, the entity is not an arm of the state for Eleventh Amendment purposes, regardless of the degree to which the state is involved in the entity's financial or other affairs. (See, e.g., *Duke v. Grady Mun. Schools, supra,* 127 F.3d 972, 981 [no immunity where state not legally liable for judgment against school district, even though district received 98 percent of its funds from state]; *San Antonio Independent School Dist. v. McKinney, supra,* 936 S.W.2d 279, 284 [no immunity where judgment against a school district would be paid "from the funds of the school district, whether generated locally or appropriated by the State, not from the state treasury"].) In that event, *Belanger*'s conclusion that California school districts are arms of the state because they are principally state funded would be questionable, unless it were also shown that the state treasury would be directly vulnerable to a judgment in the particular case.

As a general matter of California law, the state does not have respondeat superior liability for the acts of a school district. (*Johnson v. San Diego Unified School Dist.* (1990) 217 Cal.App.3d 692, 698-700.) In addition, Government Code section 970, which governs payment of judgments against public entities, distinguishes between "the state or any . . . agency of the state claims against which

are paid by warrants drawn by the Controller" and a "local public entity." (*Id.*, subd. (c).) Although the definition of "local public entity" in section 970, subdivision (c), does not expressly include a school district, the California Law Revision Commission Comment to section 970 states that enactment of the section "permits the repeal of a number of special statutes applying to particular types of local public entities: [former] Educ.Code §§ 35201 (duty of *school district* to pay 'any judgment for debts, liabilities, or damages'). . . . " (Cal. Law Revision Com. com., 1980 amend., 32A pt. 1 West's Ann. Gov. Code (1995 ed.) foll. § 970, p. 110, italics added.) Thus it appears that, for purposes of paying judgments, a school district is not considered an agency whose liabilities "are paid by warrants drawn by the Controller."

However, we decline to read *Hess* and *Doe* to preclude immunity based on this single factor. *Hess* is unusual in that it involved an entity created by two states with the consent of Congress. The court noted that, because the federal government was involved, subjecting the entity to suit in federal court did not present the Eleventh Amendment problems that might exist with respect to a wholly state-created entity. (*Hess, supra,* 513 U.S. 30, 41.) In fact, the court was required to *presume* the bistate entity did not qualify for immunity, unless it was shown that the states and Congress intended it to be immune. (*Id.*, at pp. 43-44.) No such presumption exists with respect to single state entities such as school districts.

Further, as noted, the court in *Hess* stopped short of saying the state's legal liability was dispositive. To the

contrary, the court stated the test for immunity as follows: "If the expenditures of the enterprise exceed receipts, is the State in fact obligated to pay the resulting indebtedness of the enterprise? When the answer is 'No' – *both legally and practically* – then the Eleventh Amendment's core concern is not implicated." (*Hess, supra,* 513 U.S. at p. 51, italics added.) Similarly, the court said in a previous decision that the purpose of Eleventh Amendment immunity was to "protect the state treasury from liability that would have had *essentially the same practical consequences* as a judgment against the State itself." (*Lake Country Estates, Inc. v. Tahoe Reg. Plan.* (1979) 440 U.S. 391, 401 [99 S.Ct. 1171, 1177, 59 L.Ed.2d 40], fn. omitted, italics added.)

The italicized language suggests that whether the state is legally liable for a judgment against an entity is only one factor. The court also must consider whether the state is "practically" liable, as would arguably be the case where the state provides the entity's funding and therefore would indirectly end up paying a judgment against it. (See, e.g., *Hadley v. North Arkansas Community Technical College, supra,* 76 F.3d 1437, 1439-1441 [community college was arm of state where, even if college could initially pay judgment from other sources, state would ultimately make up budget shortfall].)

The court in *Doe* also did not say legal liability was the only relevant question. To the contrary, it appeared to endorse a flexible approach under which a variety of factors would be considered. The court noted that in past cases it had "sometimes examined 'the essential nature and effect of the proceeding' . . . and sometimes focused on the 'nature of the entity created by state law' to

determine whether it should 'be treated as an arm of the State'. . . . " (*Doe, supra,* 519 U.S. at pp. 429-430, fn. omitted.) The *Doe* court did say that "[w]hether a money judgment against a state instrumentality or official would be enforceable against the State is of *considerable importance* to any evaluation of the relationship between the State and the entity or individual being sued." (*Id.*, at p. 430, italics added.) Again, however, the italicized language suggests that although the liability factor is important, it is only one factor in considering "the relationship between the State and the entity. . . . "

Additionally, the only question in *Doe*, which the court described as a "narrow" one, was whether the university's ability to seek indemnification from the federal government vitiated its Eleventh Amendment immunity. The court expressly declined to reexamine the Ninth Circuit authority holding the university was an arm of the state. (*Doe, supra,* 519 U.S. at p. 432.) *Doe* thus stands merely for the proposition that the fact state funds are *not* actually used to pay a judgment for which the state *is* legally liable does not *preclude* immunity. It does not follow that the converse is also true, i.e., that if an entity uses funds provided by the state to pay a judgment for which the state is *not* legally liable, there can be no immunity.

Finally, neither *Hess* nor *Doe* gave any indication of disagreement with the immunity analysis employed in *Mt. Healthy.* In fact, both decisions cited *Mt. Healthy.* (*Hess, supra,* 513 U.S. at p. 47; *Doe, supra,* 519 U.S. at p. 430.) Yet the court in *Mt. Healthy* – the authority most relevant here since it involved a school board – appears not to have considered the legal liability of the state at all.

(*Mt. Healthy, supra,* 429 U.S. 274, 280-281.) Instead, the court examined "the nature of the entity created by state law," the extent of state guidance and funding, and the entity's independent ability to raise funds. (*Id.*, at p. 280.)

Subsequent decisions have declined to interpret *Hess* and *Doe* as reducing the Eleventh Amendment inquiry to a question of the state's legal liability for a judgment against the entity. In *Gray v. Laws* (4th Cir. 1995) 51 F.3d 426, the Fourth Circuit noted that, in fact, *Hess* identified other factors as also relevant, such as the state's characterization of the entity, the entity's functions, and the extent of state control. (*Id.*, at pp. 432-433.) The *Gray* court concluded the correct approach under *Hess* was that, if the state treasury *would* be liable for a judgment, that fact was "largely, if not wholly, dispositive," and the entity would be entitled to immunity. (*Gray, supra,* at p. 433.) If, on the other hand, the state's treasury *would not* be affected by a judgment, then the court should consider the other relevant factors, including "whether the state possesses such control over the entity . . . that it can legitimately be considered an 'arm of the state.' " (*Id.*, at p. 434.)

The court in *Simon v. State Compensation Insurance Authority, supra,* 946 P.2d 1298 similarly concluded that under *Hess* and *Doe* "the judgment liability factor alone does not resolve whether an entity is entitled to Eleventh Amendment immunity." (*Simon, supra,* at p. 1306.) The court noted that both *Hess* and *Doe* considered other factors as well and that neither rejected the multifactor "balancing" test employed in *Mt. Healthy* despite having the opportunity to do so. Therefore, it concluded the

balancing test remained in effect. (*Simon, supra,* at p. 1307.)

Employing that analysis here, we find a number of factors that favor immunity. The California Constitution obligates the state Legislature to "provide for a system of common schools. . . . " (Cal. Const., art. IX, § 5.) As the *Belanger* court noted, school districts receive their funding primarily from the state. The Education Code provides that the state Controller during each fiscal year shall transfer from the General Fund of the state to the State School Fund a specified amount per pupil. (Educ. Code, § 14002.) The state Superintendent of Public Education is required to certify to the Controller the amounts estimated to be apportioned to each school during the ensuing fiscal year. (Educ. Code, § 41330.) As the California Supreme Court has recognized, "since the adoption in June 1978 of Proposition 13, limiting local taxation of real property (Cal. Const., art. XIII A), school districts have become more dependent on appropriations by the Legislature for a major part of their revenue." (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 592, fn. omitted.)

Further, although funds received by school districts are to be paid into the county treasury for the credit of the district (Educ. Code, §§ 41001, 41002), numerous courts have stated that " '[s]chool moneys *belong to the state* and the apportionment of funds to a school district does not give the district a proprietary interest in the funds. . . . ' " (*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 635, italics added; accord, *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1578, fn. 5; *California Teachers Assn. v.*

Hayes (1992) 5 Cal.App.4th 1513, 1525.) Because school district funds are considered funds of the state, payment of a judgment from such funds would have "essentially the same practical consequences as a judgment against the State itself." (*Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra,* 440 U.S. 391, 401.)

School districts are authorized to raise their own revenues by issuing and selling bonds, with the approval of the electors of the district. However, state law specifies the purposes for which the proceeds may be used. (Educ. Code, § 15100.) In addition, the state constitution requires that general obligation bond proposals of school districts be approved by a two-thirds vote. (Cal. Const., art. XVI, § 18.) Similarly, while school districts are authorized to impose development charges to finance school construction, the state Legislature has declared that such financing measures are "matter[s] of statewide concern" and for that reason has "occupie[d] the subject matter . . . to the exclusion of all local measures" on the subject. (Gov. Code, § 65995, subd. (e); see also *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 918.)

Finally, although in general the state is not legally responsible for the obligations of a school district, the California Supreme Court has ruled that in some instances the state has a constitutional duty to assume responsibility for the operations of a school district, including its fiscal affairs. In *Butt v. State of California, supra,* 4 Cal.4th 668, a school district lacked funds to complete the final six weeks of its school term. The Supreme Court affirmed an injunction authorizing the state Superintendent of Public Instruction to displace the

school board, operate the district through his own administrator, and impose a plan for the district's permanent financial recovery. (*Id.*, at pp. 694, 696, 704.)

The court in *Butt* explained that the California Constitution "makes public education uniquely a fundamental concern of the State. . . . " (*Butt v. State of California, supra*, 4 Cal.4th at p. 685.) It rejected the state's contention that school districts would "feel free to overspend if encouraged to believe in the availability of State relief." (*Id.*, at p. 690.) The court further noted that the state itself had endorsed a policy of emergency conditional loan assistance to districts in financial difficulty. (*Id.*, at p. 690; see Educ. Code, § 41320.2.)

California statutes and case law thus demonstrate the state's extensive responsibility for and involvement in the fiscal affairs of school districts. On balance, the criteria included in this category of factors favor treating a school district as an arm of the state.

b. *Political status*

As identified by the court in *Lynch v. San Francisco Housing Authority, supra*, 55 Cal.App.4th 527, the relevant factors in assessing the political status afforded a government entity by the state include whether the entity performs central governmental functions; whether the entity may sue, be sued, and hold property in its own name; the corporate status of the entity under state law; the degree of autonomy enjoyed by the entity; the entity's immunity from state taxation; and the geographic scope of the entity's operation. (*Id.*, at pp. 533-534.)

There can be little dispute that the function performed by school districts, the education of the public, is a matter of central governmental concern. In *Butt v. State of California, supra,* 4 Cal.4th 668, the California Supreme Court stated: "Public education is an obligation which the State assumed by the adoption of the Constitution. . . . '[M]anagement and control of the public schools [is] a matter of state[, not local,] care and supervision. . . . ' . . . Local districts are the State's agents for local operation of the common school system. . . . " (*Id.,* at pp. 680-681.) The court further observed that "[t]he Constitution has always vested 'plenary' power over education not in the districts, but in the State, through its Legislature, which may create, dissolve, combine, modify, and regulate local districts at pleasure." (*Id.,* at p. 688.)

As examples of state regulation of school affairs, the court in *Butt* cited Education Code sections addressing "such matters as county and district organization, elections, and governance; educational programs, instructional materials, and proficiency testing; sex discrimination and affirmative action; admission standards; compulsory attendance; school facilities; rights and responsibilities of students and parents; holidays; school health, safety, and nutrition; teacher credentialing and certification; rights and duties of public school employees; and the pension system for public school teachers." (*Butt v. State of California, supra,* 4 Cal.4th 668, 689, citations omitted.)

We recognize that other statutory and constitutional provisions sometimes treat school districts in the same manner as governmental entities which do not enjoy

Eleventh Amendment immunity, such as cities and counties, for certain purposes. (See, e.g., Cal. Const., art. XIIIB, § 8; Gov. Code, §§ 54240, 54951, 82041 [defining school district as "local" government agency]; but see Gov. Code, § 17561 [referring separately to "local agency" and "school district" for purposes of reimbursement for state-mandated costs].) However, "[l]abeling an entity as a 'state agency' in one context does not compel treatment of that entity as a 'state agency' in all contexts." (*Lynch v. San Francisco Housing Authority, supra,* 55 Cal.App.4th 527, 534; see also *Doe, supra,* 519 U.S. 425, 427, fn. 2 [declining to decide "whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others"].) Conversely, it should follow that labeling an entity as a local agency for some purposes also should not compel treatment of it as such for all purposes. For this reason, authority distinguishing between the state and school districts in non-Eleventh Amendment contexts (e.g., *North Orange County Community College Dist. v. CM School Supply Co.* (1998) 63 Cal.App.4th 362, 366; *LeVine v. Weis* (1998) 68 Cal.App.4th 758, 766) is not controlling.

Moreover, California courts have observed that the state's pervasive involvement in school affairs makes its relationship with school districts qualitatively different from its relationship with entities such as cities and counties: "A school district's relationship to the state is different from that of local governmental entities such as cities, counties, and special districts. . . . Local school districts are agencies of the state and have been described as quasi-municipal corporations. [Citation.] They are not

distinct and independent bodies politic." (*Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th 1564, 1578-1579, fn. 5; accord, *California Teachers Assn. v. Hayes, supra,* 5 Cal.App.4th 1513, 1524.) This distinction in California law between school districts and cities and counties is especially significant in view of the United States Supreme Court's repeated formulation of the ultimate Eleventh Amendment question as whether an entity "is more like a county or city than it is like an arm of the State" (*Mt. Healthy, supra,* 429 U.S. 274, 280) and whether it "has the same kind of independent status as a county or is instead an arm of the State. . . . " (*Doe, supra,* 519 U.S. 425, 429, fn. 5.)

Similarly, while a California school district's governing board may hold and convey property for the use and benefit of the district (Educ. Code, § 35162), the California Supreme Court has stated that "[t]he beneficial ownership of property of the public schools is in the state. . . . '[T]he beneficial owner of the fee [of public school property] is the state itself, and . . . its agencies and mandatories – the various public and municipal corporations in whom the title rests – are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs.' " (*Hall v. City of Taft, supra,* 47 Cal.2d 177, 181-182.) Consequently, a school district's ability to own property does not indicate it is not an arm of the state.

The remaining criteria do not appear to militate strongly one way or the other. School districts may sue and be sued independently of the state (Educ. Code, § 35162), and they operate within specific geographical

limits rather than statewide. But this is also true of community college districts which, as stated previously, have been found to be arms of the state. (Educ. Code, § 72000.) Conversely, although school districts have the same exemption from property taxation as does the state, so do counties and cities, which do not enjoy immunity. (Cal. Const., art. XIII, § 3; Rev. & Tax. Code, § 202.)

Again, on balance, the relevant criteria favor immunity.

III

CONCLUSION

In view of the extensive control of the state over the fiscal affairs and political status of school districts, the Ninth Circuit in *Belanger* correctly determined a California school district should be considered an arm of the state for purposes of the Eleventh Amendment. Unlike the Ohio school board involved in *Mt. Healthy*, California school districts are subject to substantially more than "some" state funding and control; in fact, as discussed, beneficial ownership of their funds and other property resides in the state, and they are agencies of the state under state law. Therefore, the District shared the state's immunity from suit under section 1983, and the trial court properly sustained the demurrer.

IV

DISPOSITION

The judgment is affirmed. The District shall recover costs on appeal.

CERTIFIED FOR PUBLICATION

/s/ Richli
Acting P.J.

We concur:

/s/ Ward
J.

/s/ Gaut
J.

CERTIFIED FOR PUBLICATION
COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

NORMA KIRCHMANN, Plaintiff and Appellant, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	E026060 (Super.Ct.No. 314830) **ORDER MODIFYING OPINION AND DENYING REHEARING** [NO CHANGE IN JUDGMENT] (Filed Oct. 11, 2000)

THE COURT

It is ordered that the opinion filed September 27, 2000, be modified as follows:

Immediately before the first full paragraph on page 9, the following is inserted:

> Kirchmann argues this analysis should not apply in California, because by enacting the Tort Claims Act the state has waived sovereign immunity against any and all statutory claims in state court actions, even if the Eleventh Amendment would not permit such a claim to be brought in federal court. She points to Government Code sections 815, which provides that a public entity is not liable for an injury "[e]xcept as otherwise provided by statute," and 811.2, which defines "statute" to include an act of Congress such as section 1983.

> Kirchmann overlooks the fact that whether an entity is a "person" subject to suit under section 1983 is a matter of *federal* law and is not affected by whether the entity has sovereign immunity under state law. The United States Supreme Court said in *Howlett by and through Howlett v. Rose, supra,* 496 U.S. 356 [110 S.Ct. 2430, 110 L.Ed.2d 332]: "The elements of, and the defenses to, a federal cause of action are defined by federal law. [Citations.] *A State may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability.* [Citation.] Since this Court has construed the word 'person' in § 1983 to exclude States, neither a federal court nor a state court may entertain a § 1983 action against such a defendant." (496 U.S. at pp. 375-376, italics added.)
>
> Thus, California cannot, by enacting the Tort Claims Act, make school districts liable under section 1983 if they are not "persons" subject to section 1983 liability under federal law. As *Will* and its progeny demonstrate, the answer to that question depends on whether an entity is an arm of the state for Eleventh Amendment purposes.

There is no change in judgment

Appellant's petition for rehearing is denied.

CERTIFIED FOR PUBLICATION

/s/ Richli
Acting P.J.

We concur:

/s/ Ward
J.

/s/ Gaut
J.

Court of Appeal, Fourth Appellate District,
Divison Two – No. E026060
S092671

IN THE SUPREME COURT OF CALIFORNIA
En Banc

NORMA KIRCHMANN, Plaintiff and Appellant,

v.

LAKE ELSINORE UNIFIED SCHOOL DISTRICT ET AL.,
Defendant and Respondent.

(Filed Jan. 10, 2001)

Petition for review DENIED.

Brown, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice